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No. 88-1848

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The plaintiff class in this case was represented by some 30 lawyers from nine different law firms in New York, Chicago, Los Angeles, and Washington, D.C. See Pet. App. 66a-67a. The district court initially determined that the lodestar award of $2 million—based on a maximum approved rate of $240 per hour (*ibid.*)—constituted a reasonable attorneys' fee and that a risk multiplier was "neither necessary nor appropriate" (*id.* at 64a). The court of appeals reversed, holding that a multiplier could be awarded whenever a class action brought under a fee-shifting statute results in a monetary settlement. Pursuant to that ruling, the district court granted a multiplier of 1.6, effectively enhancing the maximum hourly rate to $385. Thus, as a result of the decision below, counsel will receive a bonus of $1.2 million that otherwise would have gone to their clients.

As discussed in our petition, the court of appeals' decision authorizing attorneys' fee multipliers despite this Court's decision in *Delaware Valley II* raises a frequently recurring question of substantial public importance. The significance of this multiplier issue is underscored by the *amicus curiae* briefs that have been filed in support of the petition on behalf of both state and local governments and a broad spectrum of the business community. Nowhere have respondents disputed the general importance of the question presented or the adverse practical consequences of the decision below for the legal system.

Our petition and the *amicus* briefs also demonstrate that the court of appeals' ruling is flatly inconsistent with the Magnuson-Moss Act and *Delaware Valley II*. Respondents do not attempt to show how the court of appeals' approach to multipliers can be squared with the principles adopted by Congress and this Court. Instead, they assert that those principles are simply irrelevant here because of the existence of a settlement fund. In

addition, they seek to immunize the court of appeals' ruling from further review by contending that GM lacks standing to file a petition for certiorari and that the multiplier may be upheld on an alternative theory that was not the basis for the decision actually rendered. None of these arguments militates against the need for this Court's review.

I. GM HAS STANDING TO SEEK CERTIORARI

Respondents concede that they and their clients "have adverse interests in allocating the [settlement] fund" and that the multiplier awarded to respondents "reduc[es] the recovery of the plaintiffs whom they represented" (Br. in Opp. 11). Nevertheless, respondents unabashedly contend that GM—which alone has the incentive to protect the interests of the class on the fee issue—has no standing to seek review of respondents' legal entitlement to an enhanced fee.

Respondents completely overlook the fact that GM has a continuing economic interest in the allocation of the settlement fund. The reverter clause in the settlement agreement (¶ 25) provides that "[a]ny portion of the Settlement Fund or accrued interest remaining after the distributions [to the class and counsel] shall revert to General Motors." Under this express provision, GM has a right to any money in the settlement fund that is not paid out. If the attorneys' fee multiplier is set aside, an additional $1.2 million will be available to the class members. As is ordinarily the case, a portion of that amount will not in fact be distributed to the class—and hence will revert to GM—due to factors such as undeliverable checks (*e.g.*, changes in residence with no forwarding address), and lost and uncashed checks. Thus, GM has "an interest, arising from its colorable claim for the return of excess money, in whether attorney's fees could be [enhanced]" (*Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 481 n.7 (1980)), and this is sufficient to confer standing. Indeed, GM's interest under the reverter clause

is the same interest that it had in the district court, which respondents concede gave GM standing (see Br. in Opp. 5).

GM also retains an additional interest in the proper distribution of the money it paid to satisfy plaintiffs' claims under the settlement agreement. As explained in the petition (at 20-21; see also Nat'l Ass'n of Counties Am. Br. 3, 9-10; PLAC Am. Br. iv, 5), GM has a direct economic stake in promoting customer goodwill by ensuring that the maximum amount of the settlement fund is disbursed to the class members—its past and prospective customers—rather than to respondent law firms. Indeed, GM's interest in opposing an enhanced fee was recognized in the settlement agreement, which specifically preserved GM's right to challenge any multiplier.

In cases such as this one, a settlement does not simply end the litigation and limit the defendant's liability; it also is designed to re-establish amicable relations between the defendant and its customers. Here, the class claimants—consisting of more than 64,000 purchasers of GM automobiles—constitute a large and important group of potential future customers for GM products. Under the ruling below, however, $1.2 million of GM's settlement payment will be used to give a windfall to counsel rather than to defray the repair expenses incurred by the class members and thereby restore customer goodwill. If the enhanced attorneys' fee had exhausted the entire settlement fund, the interference with GM's legitimate business interest would be clear; GM's interest in the present case is no different in principle.

Allowing the settling defendant to be heard on the issue of an attorneys' fee multiplier provides a vital safeguard for the interests of absent class members. In this case, for example, the interests of GM and the class coalesced once the settlement was reached: both sought to ensure that plaintiffs would receive the maximum benefit of the settlement. At the same time, as respond-

ents concede, a conflict arose between class counsel and their clients over the distribution of the settlement fund. Thus, counsel could not represent the class members on the multiplier issue, and GM in essence stepped in to protect the interests of the class (which were common with its own). In analogous areas of the law, third parties—including former adversaries in litigation—have been permitted to challenge attorneys' fee awards in order to protect the interests of claimants that otherwise could not practicably be asserted. See, *e.g.*, *Allen* v. *United States*, 606 F.2d 432, 434 (4th Cir. 1979) (in veterans' benefit case, "the government has standing [to contest a fee award] even though the fees are not assessed against the United States * * * [because it] has an interest in seeing that funds it owes to litigants are disbursed properly"). The district court repeatedly recognized that GM was serving as the guardian of the class's interest, commending it for acting "on behalf of the class" (11/30/88 Tr. 27) and for providing "great help to the class" (4/25/89 Tr. 5) in view of the fact that "plaintiffs' counsel * * * have their own self interests" (3/29/89 Tr. 5).

Respondents argue (Br. in Opp. 6), however, that it is the district court that should protect the interests of the class members. While the court must ensure that the amount of the fee it awards is reasonable, it cannot act as the class's advocate on the question whether a multiplier is authorized by law. Furthermore, even if the district court could adequately protect the class at the trial level, it could not perform the same function in the court of appeals or in this Court, *e.g.*, by filing the petition for certiorari.

Respondents also note (Br. in Opp. 6) that no member of the class intervened to contest the fee award (although several did write to protest counsel's exorbitant fee request). The suggestion that respondents' claim to a multiplier must go unopposed unless individual class members—each of whom has only a small economic stake

—come forward and "obtain[] additional counsel with which to litigate this issue" (*ibid.*) is completely unrealistic and inconsistent with the underlying theory of class actions. See, *e.g.*, *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326, 338 (1980).

II. THE COURT OF APPEALS' DECISION IS PLAINLY ERRONEOUS

Little need be added to the petition to show the serious error in the court of appeals' decision. Congress has determined that a reasonable attorneys' fee shall be "based on actual time expended" (15 U.S.C. § 2310(d)(2))—a standard that squarely forecloses a multiplier that *exceeds* the lodestar computed from time expended and hourly rates. Moreover, the concerns underlying *Delaware Valley II*—in particular, the windfall produced by a multiplier that duplicates factors already reflected in the lodestar, the perverse incentives that a risk multiplier creates to bring marginal litigation, and the undesirability of spawning extensive litigation over the issue of attorneys' fees—are equally telling here. See *Missouri* v. *Jenkins*, No. 88-64 (June 19, 1989), slip op. 7-8 (*Delaware Valley II* "rejected an argument that a prevailing party was entitled to a fee augmentation to compensate for the risk of nonpayment").

Of even greater importance, respondents completely ignore the intolerable conflict of interest that is engendered by the court of appeals' decision. Under the decision below, counsel will be encouraged to settle litigation in order to be eligible for a multiplier regardless of the best interests of their clients. See *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2256 (1989) (rejecting the construction of an attorneys' fee statute that created an "incentive" that "runs directly counter to long established ethical canons of the legal profession").

Despite the fact that both Congress and this Court have defined a reasonable attorneys' fee in terms of the lodestar amount, respondents offer two theories to justify

the award of a risk-enhanced fee over and above the reasonable lodestar fee. Neither has any merit.

First, respondents repeatedly assert that this is a "common fund" case that is governed by "equitable" principles rather than a statutory "fee shifting" case. But respondents' rote incantation of the phrase "common fund" does not provide any reason why a different set of rules should apply to a case litigated under a fee-shifting statute simply because a monetary settlement was reached. Indeed, because "equity follows the law" (Nat'l Ass'n of Counties Am. Br. 11), the standards of the Magnuson-Moss Act and *Delaware Valley II* would be controlling here even if equitable principles were relevant. Respondents utterly fail to explain how it could be "equitable" to award a lavish fee that Congress and this Court have declared to be unreasonable.

Second, respondents attempt to distinguish *Delaware Valley II* on the ground that the risk-enhanced fee in this case would be paid by the class members out of the settlement fund rather than directly by the defendant. Even assuming that the multiplier is not indirectly shifted to the defendant through the settlement—a proposition the *amici* refute (see Nat'l Ass'n of Counties Am. Br. 2, 8-9; PLAC Am. Br. iii, 4)—respondents' proffered distinction does not render *Delaware Valley II* inapplicable. Respondents treat this consideration as if it were the sole basis for the Court's decision, but of course multipliers were harshly criticized for a number of other reasons (see page 5, *supra*)—none of which respondents discuss, and all of which apply fully to the multiplier in this case.

Furthermore, windfall multipliers do not become any more "equitable" simply because they are taken out of the plaintiffs' pocket instead of the defendant's. On the contrary, there is even less justification to impose the economic burden of the multiplier on the innocent class members who are not only the intended beneficiaries of the federal statute but also the clients of the lawyer seeking the increased fee. Under *Delaware Valley II*,

plaintiffs who successfully settle a case cannot fairly be required to pay a multiplier to their counsel for the lawyers' losses in other litigation.

The court of appeals' sweeping "common fund" theory holds enormous practical consequences for the litigation system. In class actions that are brought pursuant to a fee-shifting statute and result in monetary relief, counsel would be allowed to seek a multiplier notwithstanding the statute and *Delaware Valley II*, and the amount of the multiplier awarded as a matter of "equity" would not be limited to—and could greatly exceed—the reasonable attorneys' fee that would be available under fee-shifting principles. See Br. in Opp. 10. Thus, if *Delaware Valley II* had been a class action involving a monetary fund, counsel would have been entitled to a multiplier for any litigation risks in that case despite this Court's holding that a multiplier was impermissible under the statute. Such a rule is a frontal assault on this Court's decision and represents an open invitation for over-reaching lawyers to enrich themselves at the expense of their clients.

Respondents nonetheless complain that the absence of multipliers will "discourage * * * consumer litigation" (Br. in Opp. 12) and will fail to provide fee awards "analogous to the fees paid to lawyers in common law tort contingency fee cases" (*id.* at 11). The short answer is that Congress and this Court have determined that attorneys' fee awards should be limited to a "reasonable" fee, which generally does not include a risk multiplier; *Delaware Valley II* considered and rejected the contention that multipliers are necessary to encourage meritorious lawsuits, and respondents' assertion is no more availing here. Furthermore, the Court consistently has held that attorneys' fees awarded by courts "should [not] be modeled upon the contingent fee arrangements used in personal injury litigation." *Blanchard* v. *Bergeron*, 109 S. Ct. 939, 945 (1989); see also Pet. 11 & n.3. Litigants can, of course, agree by private contract to pay their lawyers a large contingent fee that embodies a sub-

stantial risk bonus, but a court has no authority to grant anything other than a "reasonable" fee, which precludes a risk-enhanced award.

Finally, respondents cite (Br. in Opp. 13-14) several "common fund" cases in which multipliers have been granted. Significantly, however, all of those decisions preceded *Delaware Valley II*. It is hardly surprising that multipliers were prevalent prior to this Court's decision sharply curtailing enhanced fees—indeed, courts at that time routinely awarded multipliers even under fee-shifting statutes—but that sheds no light on the central question here: whether multipliers in class actions brought under a fee-shifting statute and resulting in a monetary settlement are exempt from the rules announced in *Delaware Valley II*. Respondents' brief in opposition does not advance any persuasive reason to conclude that they are.

III. RESPONDENTS' ALTERNATIVE MULTIPLIER THEORY DOES NOT PRECLUDE THIS COURT'S REVIEW OF THE COURT OF APPEALS' DECISION

Respondents seek to divert the Court's attention from the question presented in the petition by advancing an alternative theory—entirely unrelated to the holding of the court of appeals—to defend the fee multiplier. On remand from the court of appeals, the district court, weeks after selecting a multiplier of 1.6, stated in a supplemental order that "without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market" (Br. in Opp. App. 29a). This statement was requested by respondents—after the petition for certiorari had been filed—purportedly to "tie up * * * a loose end" on "a small point" (5/23/89 Tr. 10) that would become relevant in the event "that the cert petition is granted * * * [and the case is] sent back all the way down a year or two later" (*id.* at 8). Respondents now contend, however—relying on the exception suggested in Justice O'Connor's concurring opinion in *Dela-*

ware Valley II that a multiplier might be available if necessary to obtain counsel (see Pet. 11)—that the district court's statement justifies a multiplier even if *Delaware Valley II* is applicable here.

Respondents' eleventh-hour theory does not insulate from this Court's review the holding actually rendered by the court of appeals. The confusion and disruption that the Seventh Circuit's erroneous decision will engender cannot be avoided by pointing to an alternative rationale that might sustain the multiplier. The ruling below already has been followed in other cases (see Pet. 24-25 & n.9), and it is that precedent that "reintroduces much of the confusion over the availability of risk multipliers" (Nat'l Ass'n of Counties Am. Br. 5) that the Court sought to dispel in *Delaware Valley II*. For the reasons previously discussed, the important question presented here warrants resolution by this Court, and respondents' claim that they might be able to prevail on some other ground does not prevent review of that question.

Beyond this, the conclusory statement of the district court would not satisfy Justice O'Connor's concurring opinion in *Delaware Valley II*. The court's statement was not the result of an adversarial fact-finding hearing but instead was premised on boilerplate and self-serving affidavits offered by respondents, which refer without differentiation to "complex civil litigation" (Br. in Opp. App. 2a-3a, 8a, 19a, 26a) and seek to justify multipliers of up to three times the lodestar (*id.* at 5a, 26a). In fact, the identical affidavits have been used in other attorneys' fee cases. Contrary to respondents' assertion, affidavits of the kind submitted here have been held to fall well short of the showing necessary to justify a multiplier. See, *e.g.*, *Jenkins* v. *Missouri*, 838 F.2d 260, 268 (8th Cir. 1988), aff'd in part on other grounds, No. 88-64 (June 19, 1989), and cert. denied, 109 S. Ct. 221 (1988).

If the district court's casual statement—which contradicts its earlier detailed findings that the lodestar consti-

tuted a fully adequate attorneys' fee (see Pet. 7)—were sufficient to support a multiplier here, multipliers would become routine in all "complex civil litigation." Indeed, the present case—which attracted nine separate law firms, which was brought under a statute that specifically put counsel on notice from the outset that fees would be limited to actual time expended, and which "never proceeded very far beyond the initial pleading stages" (Pet. App. 64a)—is a particularly clear example of a situation in which a multiplier is *not* necessary. This Court could not have intended to open a gaping loophole in *Delaware Valley II* that would be available whenever counsel can procure stock affidavits in support of a multiplier from colleagues in the plaintiffs' bar. Accordingly, respondents' after-the-fact reliance on Justice O'Connor's concurrence in *Delaware Valley II* does nothing to dispel the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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